IN THE

Supreme Court of the United States

No. 515

HEART OF ATLANTA MOTEL, INC.

v.

UNITED STATES OF AMERICA

BRIEF AMICUS CURIAE ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

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TABLE OF CONTENTS

TABLE OF CASES

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PRELIMINARY STATEMENT

In view of the limited time which the Court was able to allow for the preparation of Amicus briefs in this case and the work load of the personnel of the Staff of this office, it was impossible for us to undertake direct preparation of a brief. However, similar litigation is pending in the United States District Court for the Eastern District of Virginia in which John Vonetes, trading as Lee House Diner, is defendant. The litigant expressed a desire to have such brief prepared by his counsel and that has been done and the brief is adopted as the brief on behalf of the Commonwealth of Virginia.

ARGUMENT

A

Seeking the Issue

Time does not permit the writing of an exhaustive brief nor, in view of the nature of the brief, does such seem appropriate.

It is our position simply that in the enactment of Title II of the Civil Rights Act of 1964, Congress clearly and flagrantly exceeded the authority vested in it by the Constitution of the United States.

We have not had the benefit of brief setting forth the basis on which it might be argued that such legislation is Constitutional, but reference to the statement made by the Attorney General of the United Staes in his appearance before the Senate Judiciary Committee on July 16, 1963, reveals that he foresaw that "very far-reaching and grave issues would be raised by a bill resting solely upon the Fourteenth Amendment." Mr. Kennedy went on to say—

> "That amendment deals only with state action, not individual action. To find state action in discriminations by private businesses solely because they are licensed by the state would impose on the legislation very heavy burdens which it need not carry.
>
> "A decision by the Supreme Court upholding such a bill would require overruling the decision in the Civil Rights Cases of 1883. Passing and upholding a bill solely upon the licensing theory or some variation would have vast Constitutional implications. Not only would such a theory break new soil, but if the businesses with which we are concerned are state action because they

> are licensed, then so are private educational establishments, charitable organizations, doctors, dentists, lawyers, and many other professional people for they are licensed too.
>
> "Further there are serious practical problems. Under the licensing theory, the scope of the bill would depend upon what the various states decide to license or not to license. Any state which abandoned its licensing scheme could defeat the bill.
>
> "Even today its application would vary from state to state, defeating the need for national uniformity on this great moral principle. In Alabama, for example, such legislation would cover such occupations as architects, embalmers, sleight-of hand artists and feather renovators but it would not reach department stores in Minnesota or, so far as we have found, hotels or motels in Pennsylvania.
>
> "But although there are grave difficulties about the licensing theory, the Fourteenth Amendment gives valuable support for the proposed provisions * * *"

Finally, the Attorney General announced his view as to the constitutional basis for the legislation:

> "I think this Constitutional theory might ultimately prevail, be upheld by this Supreme Court, but since there are uncertainties and potential difficulties, I believe it is essential that the bill be clearly limited to those establishments over which Congress has unquestioned power under the Commerce Clause."

Apparently, then the chief issue is whether the Commerce Clause permits such legislation.

B

The Commerce Clause

In *Brown* v. *Board of Education*, 345 U. S. 972, 97 L. Ed. 1388, 73 S.Ct. 1114, this Court was concerned with the scope of the Fourteenth Amendment and propounded to Counsel for discussion in briefs and arguments the following question:

> "What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"

We urge the Court to propound such question with respect to the contemplation and understanding of the framers of the Constitution insofar as the Commerce Clause and the Civil Rights Act of 1964 are concerned. Not even a distorted version of history could bring the Court to the view that the Commerce Clause was intended to empower Congress to enact such legislation.

Among other things, the Constitution was ordained and established to "secure the Blessings of Liberty." Can anyone seriously maintain that our forefathers deemed it to be a part of "liberty" that the Congress of the United States could dictate to them those persons whom they must serve in their private business establishments?

What does history tell us of the Commerce Clause?

It was the necessity to regulate commerce that brought about the convention at Philadelphia in 1787 and there seems to have been no disagreement over the grant of power to Congress "to regulate commerce—among the several

States." The meaning of *regulate*, and that the Clause related only to *movement* over State lines, was so clear that it was hardly mentioned in the notes on debates. Later, in *The Federalist*, there was but one reference to the Clause, so clear was its meaning and its need. In No. 42, Madison wrote:

> "A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former."

Nowhere in *The Federalist* is any broader idea expressed. Knocking down trade barriers was all that was sought. Where does "commerce" begin and end? There is no specific answer in *The Federalist*, but, in No. 11, Hamilton simply describes commerce as "a free circulation of commodities." The implication is clear that when circulation ends, commerce ends.

That the Commerce Clause was vital to the new government seemed to have been taken for granted by everyone, because a painstaking search of Elliot's Debates (covering the debates in the several state ratification conventions) shows that the proponents of ratification did not think it necessary to dwell upon it, and, indeed, it was not mentioned except in passing.

That the opponents of ratification had no fear of the Clause is clear, because not one of them attacked it specifically as a power which was likely to be abused. Patrick

Henry, a bitter opponent in the Virginia Convention, found trouble nearly everywhere else, but accepted the Commerce Clause. It is inconceivable that he and others like him—skilled in government and fearing centralization—would have suffered the power to remain unchallenged if they could have foreseen how loosely the courts would come to construe it, or that any such proposal as this would ever have been made. In time, more power over commerce was assumed, based upon the nature of the goods, and, later, the conditions under which they were manufactured. But no one until today has seriously urged that the power should be all-inclusive and used as a sham to affect social "reform."

Although Attorney General Kennedy referred to the "unquestioned power" of Congress under the Commerce Clause, it appears that in the Civil Rights Cases, 109 U. S. 3, 27 L.Ed. 835, there was a substantial question. One question involved was the Constitutional authority of Congress under any provision of the Constitution to enact a public accommodation law similar to Title II of the Civil Rights Law of 1964. The Court focused its attention on the then recently adopted Thirteenth, Fourteenth and Fifteenth Amendments, but how withering to those who now claim power under the Commerce Clause is the Court's statement:

> "* * * of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three admendments * * *."

What more conclusive evidence could be found of the Court's understanding of the absence of such power in the Commerce Clause than the words "Of course" and "no one"?

In considering the Civil Rights Cases of 1883 we have

been unable to discover even the slightest intimation of power under the Commerce Clause in the briefs or even in Mr. Justice Harlan's exhaustive dissenting opinions. Surely, if the power is so clear today, some one would have had some slight hint of it in 1883.

C

The Ninth Amendment

Lying almost forgotten in the shadow of the struggle between the proponents of the Tenth Amendment and those of the Fourteenth in the battle over States Rights is the Ninth Amendment:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

What does this language mean? It obviously is intended as a disclaimer of the doctrine of "*inclusio unius est exclusio alterius.*" If that be true, then the people of the United States possessed rights not listed in or mentioned in the Constitution. Since the day of its ratification, one of those rights has been the right to discriminate in private business establishments such as those covered by the Civil Rights Law of 1964. How can it now be asserted that the Commerce Clause, which was already a part of the Constitution, has somehow destroyed that right?

D

The Tenth Amendment

If our premise is correct that the Ninth Amendment rec-

ognizes the existence of some rights which are unlisted and unmentioned in the Constitution, then the Tenth Amendment again becomes important. Irrespective of the effect of the Fourteenth Amendment on the reservation of power in the States which is announced in the Tenth Amendment, it is clear as Mr. Kennedy points out in his quoted statement "that Amendment deals only with state action, not individual action." Where then are we to look for a constitutional provision which affects the last clause of the Tenth Amendment?

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.*"

We contend that the present legislation offends the Constitution because it clearly interferes with rights and powers reserved by the individual citizens. For Congress and this Court to construe the words "commerce" today in a manner inconsistent with the meaning attributed to it since the writing of the Constitution makes a mockery of the Constitution.

CONCLUSION

The issue before the Court is not whether it is morally proper for one man to discriminate against another on the basis of race. The issue is one of Constitutional law. Did Congress have the power to act? The Civil Rights Cases, *supra*, dispose of Fourteenth Amendment arguments—history disposes of the Commerce Clause. Even though such decision may offend the judgment of members of this Court

as to what the law should be, their decision as judges must be predicated on what the law is . . .!

Respectfully submitted,

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